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No. 03-357

Supreme Court, U.S.
FILED
DEC 4 - 2003
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IN THE SUPREME COURT OF THE UNITED STATES

DERRAL G. ADAMS, Warden,; C.A. TERHUNE, Director,
California Department of Corrections,

Petitioners,

v.

MICHAEL D. BRAMBLES,

Respondent.

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SUPREME COURT, U.S.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The petitioner, Michael D. Brambles, asks leave to file the accompanying Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth District, without prepayment of costs and to proceed in forma pauperis, under Rule 39 of the U.S. Supreme Court Rules, and 28 U.S.C. 1915(a). Petitioner was allowed to proceed, in forma pauperis, in the United States Court of Appeals for the Ninth District.

Due to petitioner's indigency, counsel for petitioner was appointed by the United States Court of Appeals for the Ninth

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District, pursuant to 18 U.S.C. 3006A(d)(6); thus, an affidavit of indigency is unnecessary.

Dated: December 1, 2003

Respectfully submitted,
LAW OFFICES KENNETH M. STERN

BY: _____
KENNETH M. STERN, ATTORNEY
FOR RESPONDENT.

No 03-357

IN THE SUPREME COURT OF THE UNITED STATES

DERRAL G. ADAMS, Warden,; C.A. TERHUNE, Director,
California Department of Corrections,
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v.
MICHAEL D. BRAMBLES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Attorney for Respondent,
MICHAEL D. BRAMBLES by
appointment of the
Court of Appeals

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I. INTRODUCTION.

In this case, respondent, a state prisoner, filed a timely Petition for Writ of Habeas Corpus. The District Court believed that there were some unexhausted state claims in said petition. The District Court, of its own initiative, gave respondent various procedural options, including, dismissing the petitioner, without prejudice, to exhaust the unexhausted state claims; then, refile said petition. However, what the District Court failed to inform respondent was, absent tolling, the statute of limitations had already run; thus, absent tolling, respondent would be barred from pursuing a renewed Petition for Writ of Habeas Corpus, the moment the original petition was dismissed.

Because of the unique facts of this case, different from those cases cited by petitioner, this case is not appropriate for certiorari. In this case, unlike the cases cited by petitioner, it was the District Court who initiated the offer, to respondent, to dismiss the petition, without prejudice, not appellant initiating the request. As respondent had shown in his opening brief, in the ninth Circuit, when the court itself causes a party to act to his detriment, in a habeas corpus statute of limitations context, equitable tolling occurs. As such, in this situation, it cannot be denied that equitable tolling should, as the Court of Appeal recognized, should have properly been allowed.

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II. THE STAY AND ABEY PROCEDURE IS PROPER. AS THE OPINION IN THIS CASE IS CONSISTENT, NOT INCONSISTENT, WITH ROSE V. LUNDY, THERE IS NO NEED FOR THIS COURT TO GRANT CERTIORARI.

Petitioner incorrectly contends that the stay and abey procedure is improper; as, the Opinion in this case is inconsistent with Rose v. Lundy 455 U.S. 509, 102 S. Ct. 1198 (1982). Not only is the opinion not inconsistent with Rose, it is consistent with that case.

Rose concerned the habeas corpus statute, prior to AEDPA. It did not consider problems engendered by the statute of limitations. Rose was concerned with comity with the state, as to exhaustion of remedies. Staying a habeas corpus petition, to exhaust remedies in state court, do nothing to invade comity. Also, staying the habeas corpus proceeding, to exhaust state remedies, does not create problems, as discussed in Rose, of successive petitions or multiple, piecemeal litigation.

Finally, Rose presumes the habeas petitioner would have the procedural ability to dismiss a petition, exhaust remedies, then refile the petition. With the added statute of limitations, that ability, presumed by Rose to exist, can be extinguished, if there is no equitable tolling or the procedure of staying the proceedings while the unexhausted claims are exhausted.

The Supreme Court specifically noted it was dealing with habeas corpus law, based upon statutes existing a that time.

> "our holdings today reflect our interpretation of a federal statute on the basis of its language and legislative history, and consistent with its underlying policies." (Id. at p. 519, 1204.)

Thus, in Rose, the Court was concerned with a statutory scheme

where there was no statute of limitations potentially impeding a habeas corpus petitioner's access to the Court, as occurred herein, and numerous other cases which have run up against the AEDPA. statute of limitations. As such, the Rose court was not concerned with potential problems of the statute of limitations, when it gave its procedural guidelines.

Rose discussed its ruling was to effectuate comity, with the states, so that it would have the first opportunity to correct any constitutional problems.

> " . . . In Ex parte Hawk, 321 U.S. 114, 117 (1944), this Court reiterated that comity was the basis for the exhaustion doctrine: 'it is a principle controlling all habeas corpus petitions to the federal courts, that those courts will interfere with the administration of justice in the state courts only in rare cases where exceptional circumstances of peculiar urgency are shown to exist.'[fn7] . . . (Id. at p. 515, 1202.)
>
> "The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings. (Id. At p. 518, 1203.)
>
> " '... it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation," federal courts apply the doctrine of comity, which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." Darr v. Burford, 339 U.S. 200, 204 (1950). See Duckworth v. Serrano, 454 U.S. 1, 2 (1981) (per curiam) (noting that the exhaustion requirement "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights"). (Ibid)

The law set-forth in the Opinion, and the procedures set-forth, in no way impinge upon the principles of comity, of which Rose

was concerned. Comity is fully protected and honored.

Rose also noted that the habeas petitioner's right to substantive review were protected, under the statutory scheme then existing, by being able to dismiss and refile. That is frequently going to be impossible, without equitable tolling and the stay procedure, under the new statutory scheme not present when Rose was decided. Rose was based upon the premise that a petitioner would have the ability to dismiss and refile.

> "There is no basis to believe that today's holdings will "complicate and delay" the resolution of habeas petitions (STEVENS, J., post, at 550), or **will serve to "trap the unwary pro se prisoner."** (BLACKMUN, J., post, at 530.)(Id. at p. 520, 1204.)
>
> "In sum, because a total exhaustion rule promotes comity and **does not unreasonably impair the prisoner's right to relief,** we hold that a district court must dismiss habeas petitions containing both unexhausted and exhausted claims." (Id. at p. 522, 1205.)(emphasis added.)

The stay procedure is wholly consistent with Rose's pronouncement that habeas corpus petitioner's have their day in court. Thus, it is unlikely the Supreme Court would grant Certiorari, based upon Rose.

Castille v. People, 489 U.S. 346 (1989) actually helps respondent. Castille held that denying review of mixed petitions is not jurisdictional. (Id. at p. 349.) In Castille the petition, which sought the right to federally funded counsel for state proceedings, was dismissed because there was no such right, not because of a mixed petition problem. Castille does not say a court may not stay proceedings while exhaustion of state remedies occurs. It does not say when a mixed petition need be dismissed.

Victor v. Hopkins, 90 F.3d 276 (8th Cir.1996), which relies upon Rose, recognizes in extreme cases the court may ignore the dismissal of mixed petition requirement. Herein, such a case certainly exists; as, it was the District Court itself that proffered the dismiss without prejudice, then refile after exhausting issues in state court, procedure. Certainly where the court itself has proffered the procedure, followed by respondent, respondent should not be barred. Victor referenced Rose. But, in Rose, the issue was exhaustion, not tolling or stay of proceedings.

Carmichael v. White, 163 F.3d 919 (8th Cir. 1999) which relied upon Victor, is distinguishable from this action; as, Carmichael uses an incorrect implication from Rose, that there can be no stay and exhaust procedure. Rose never ruled such, nor did Carmichael.

Sterling v. Collins, 57 F.3d 451 (5th Circ. 1995) merely involves whether a federal habeas corpus petitioner has a right to federally appointed counsel to exhaust state remedies in state court. It does not state there can be no stay procedure. That was not even an issue.

III. EQUITABLE TOLLING IS PROPER.

Petitioner claims the Opinion is inconsistent with United States v. Beggerly, 118 S.Ct. 1862 (1998), which petitioner claims rules there may no be equitable tolling of the statute of

limitations.[1] Beggerly merely held there may not equitable tolling if the involved statute specifically precludes such.

> ". . . In our view, the Court of Appeals was wrong in deciding that equitable tolling is available in a QTA suit.
>
> "Equitable tolling is not permissible where it is inconsistent with the text of the relevant statute. United States v. Brockamp, 519 U. S. ___ (1997). Here, the QTA, by providing that the statute of limitations will not begin to run until the plaintiff "knew or should have known of the claim of the United States," has already effectively allowed for equitable tolling. See Irwin v. Department of Veterans Affairs, 498 U. S. 89, 96 (1990) ("We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass"). (Id. at p. 1868.)

Herein, 28 U.S.C. 2244 does not specifically, or otherwise, preclude equitable tolling. Furthermore, equitable tolling was applied by the Ninth Circuit in Calderon v. U.S.Dist. Crt. For the Cent. Dist. of Cal. 128 F.3d 1283 in which this Court denied certiorari. (522 U.S. 1099, 118 S.Ct. 899.)

Coleman v. Thompson, 501 U.S. 722 (1991) is in no way contrary to the notion of allowing the stay of a mixed petition or equitable tolling. That case concerns notions of comity, the federal court respecting the state's rights to make an initial determination concerning criminal matters within its jurisdiction. However, stay of mixed petitions, or equitable tolling, for the purpose of exhausting state court issues, in no

---

[1] Petitioner raises this new issue for the first time on this appeal, which may not be done. In its brief, and at oral argument, petitioner conceded equitable tolling may occur, as to the statute of limitations involved herein, merely contended such theory does not apply in this case.

way detracts from or diminishes the precepts of comity.

Teague v. Lane, 489 U.S. 346 (1989) merely noted issues therein were not ripe for review. It noted that the petitioner could dismiss the mixed petition, and later when the state issues were exhausted could refile the petition. At that time, statute of limitations was not a problem. It, as other cases which discuss the need to exhaust state remedies, do not state when a mixed petition needs to be dismissed. Such cases do not state that such need to be dismissed prior to the petitioner being given the chance, through a stay of proceedings, to exhaust the state remedies. There is nothing inconsistent with granting the stay, then if the petitioner does not take advantage of such, by proceeding to exhaust state remedies, then dismissing the petition.

Lamph v. Gilbertson, 501 U.S. 350 (1991), which involved sale of limited partnerships, indicated there can be equitable tolling in civil cases.

United States v. Brockamp, 519 U.S. 347 (1997) was a tax refund case, which like Beggerly, already had a tolling provision built into it; where, the statute was tolled until the date of discovery. However, herein, the tolling issue is not date of discovery, but rather, the District Court in misleading respondent into believing he could dismiss his petition, without prejudice, then refile such. AEDPA does not account for that problem. Thus, unlike Brockamp and Beggerly, it cannot be said that the Court is implementing a tolling theory; where, Congress

has already provided for such a situation.

Lonchar v. Thomas, 517 U.S. 314 (1996), a habeas corpus case, does not say there may be no equitable tolling, in such cases. Statute of limitations was not an issue in that case.

Taliani v. Chrans, 189 F.3d 597 (7th Cir. 1999) supports respondent's position. Taliani held equitable tolling is permissible. It holds the one year period is not jurisdictional. It merely holds that an attorney's error is not grounds for tolling.

David v. Hall 318 F.3d 343 (1st Cir. 2003) notes Congress recognized there should be tolling; wherein, the government impedes habeas corpus relief. Herein, the government, albeit the federal government, impeded relief wherein the District Court, upon its own initiative, induced respondent to dismiss his habeas corpus, which absent tolling, would have prevented relief. David recognized the one year period is not jurisdictional. Further, it is a case involving neglect of counsel, which is not the situation herein. In fact, in deciding the case, David assumed the existence of equitable tolling. David recognizes tolling in the most exigent circumstance. Herein, that exigent circumstance is the District Court's inducing respondent to act to his detriment, a classic equitable tolling/estoppel, situation.

Biggs v. Duncan 01-15817 (9th Cir. 2003) in footnote 3 recognizes the permissibility of staying the petition while any unexhausted claims are exhausted. Regarding petitioner's comment that the stay procedure should not be an excuse for habeas

petitioner's to fail to first exhaust their state remedies, it must be remembered that, most habeas corpus petitioner's are not represented by counsel in state or federal habeas corpus proceedings. Thus, these petitioners simply do not know, nor understand, what procedural requirements are involved; untrained and without counsel's guidance.

Respondent cites several cases for the proposition that for a court to determine whether there is a statute of limitations problem, to help a habeas corpus petitioner to determined the procedural devise to use, is not a compelling argument, in general or herein.

In general, at some point in time, the District Court will have to make that determination. It is just a matter of whether the Court will have to do so, at the time a petitioner is confronted with the problem of unexhausted claims, or, at the time the government seeks to have the petition dismissed for lack of complying with the one year statute. So, since a District Court is going to have to make that determination, anyway, there is no reason for the District Court not to do such, at a time when the petitioner has not acted to his prejudice by dismissing a petition thinking such could be refiled. This is particularly true wherein, as is usually the case, the habeas petitioner has not been appointed counsel.

In this case, since it was the District Court who proffered the procedure to respondent, which is now the issue in this case, it was incumbent upon said Court, to determine the effect of the

AEDPA statute, upon the statute of limitations, before inducing respondent to act to his potential detriment.

Petitioner claims respondent was not diligent in allowing 85 days of time between the first and second federal habeas corpus petitions. This may seem a long time for petitioner's counsel, who has the luxury of being able to work on legal documents at any time he chooses, with always available legal research resources and materials. However, respondent, unlike said counsel, must prepare his legal documents while locked up, locked down and locked in. He has limited access to legal materials, time in which he can do the preparation, and, conditions which make it expedient to prepare his documents.

Dated: December 1, 2003 LAW OFFICES KENNETH M. STERN

BY: _____
KENNETH M. STERN, ATTORNEY FOR APPELLANT.